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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-824

ROBERT S. PERSKY,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Robert S. Persky prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered on November 4, 1974 in this proceeding.

Opinion Below

The opinion of the Court of Appeals, reprinted in the appendix hereto, is reported at —— F.2d —— (2d Cir. 1974) [not yet officially reported]. An oral opinion was rendered by the District Court for the Southern District of New York, and a copy of that decision is reprinted in the appendix hereto.

Jurisdiction

The judgment of the Court of Appeals was entered on November 4, 1974. A timely petition for rehearing and suggestion for hearing *en banc* was denied on December 4, 1974. This petition for writ of certiorari is timely made. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) and under the general supervisory powers which this Court exercises over the lower federal courts.

Questions Presented

1. Whether the holding in *Mesarosh* v. *United States*, 352 U.S. 1 (1956), requiring that a defendant be accorded a new trial when the Government, in subsequent proceedings, takes such actions toward one of its chief witnesses against defendant as to cast severe doubt over the veracity of said witness' testimony at defendant's trial and which demonstrates on the part of the Government an utter disbelief in his credibility, is applicable to the instant case.

2. Whether the lower courts, in denying defendant's motion for a new trial on the ground of newly discovered evidence which indicated the likelihood of perjury by a major government witness at defendant's trial applied the correct evidentiary standard in that they stated that the newly discovered evidence must be such that the jury, being apprised of it "would probably" vote to acquit, whereas the correct evidentiary standard in such circumstances appears to be whether the jury, in light of the new evidence "might" reach a different verdict.

Statute Involved

Title 15, U.S.C. § 78ff(a):

> (a) Any person who willfully violates any provision of this chapter, or any rule or regulation thereunder the violation of which is made unlawful or the observance of which is required under the terms of this chapter, or any person who willfully and knowingly makes, or causes to be made, any statement in any application, report, or document required to be filed under this chapter or any rule or regulation thereunder or any undertaking contained in a registration statement as provided in subsection (d) of Section 780 of this title, which statement was false or misleading with respect to any material fact, shall upon conviction be fined not more than $10,000, or imprisoned not more than two years, or both, except that when such person is an exchange, a fine not exceeding $500,000 may be imposed; but no person shall be subject to imprisonment under this section for the violation of any rule or regulation if he proves that he had no knowledge of such rule or regulation.

Statement of the Case

Petitioner Robert S. Persky was indicted along with others in March, 1973 for filing a false annual report with the Securities and Exchange Commission and for conspiracy to file same in violation of 15 U.S.C. §§ 78-0 and 78-ff respectively. In May, 1973 the jury, after long deliberation acquitted petitioner of the conspiracy charge, and reconvening the next day, found him guilty on the substantive count after the judge had delivered an "Allen charge."

Petitioner appealed the verdict on the grounds that (1) the trial judge committed reversible error when, given the opportunity by the jury's not guilty verdict on the conspiracy count and their retirement for the night, he failed to instruct them the next day to disregard the hearsay evidence which was admissible only as to the conspiracy count; (2) the conspiracy verdict constituted a *res judicata* against the substantive verdict, since the substantive count incorporated by reference the heart and body of the conspiracy count; and (3) the trial court erred in refusing to allow questions in the *voir dire* requested by petitioner aimed at uncovering possible bias by jurors against attorneys. The Court of Appeals for the Second Circuit affirmed the conviction, *United States* v. *Zane,* 495 F.2d 683 (2d Cir. 1974), and this Court denied a petition for writ of certiorari, Dkt. No. 73-1910, 43 U.S.L.W. 3239 (U.S. October 22, 1974).

At trial, the Government's case against petitioner rested largely upon the testimony of Peter Galanis and Akiyoshi Yamada ("Yamada"). Yamada had originally been indicted along with petitioner as a co-conspirator, and stood accused of a long series of other securities frauds and tax offenses. Additionally, Yamada admitted to continually perjuring himself during four days of testimony before the SEC. Pursuant to a plea bargaining arrangement entered into with the United States Attorney's Office, however, Yamada was allowed to plead guilty to only three counts of the same indictment which named petitioner and his cooperation disclosed to the sentencing judge in exchange for his testimony against petitioner and two other defendants.

Despite his past performance, the Government presented Yamada to the jury as a man who had elected to reform himself, and whose testimony was now worthy of belief.

The prosecuting attorney acknowledged the circumstances attending Yamada's testimony, but vouch-safed his credibility:

> "I am telling you this because you will hear a tremendous amount of wind and air coming out of defense counsel . . . in an effort to prove Galanis and Yamada are lying to you on the stand about their activities in this case, they will tell you that a deal was made and that they were given preferential treatment by the United States Attorney's Office and by the SEC and by the Internal Revenue. . . .
>
> "And they [Galanis and Yamada] will testify frankly that they made this agreement with full recognition that if they did not reach the agreement they could be charged in 20 or more serious securities violations. I want to get that out in the open, and I think as the trial wears on you will find that these things will come out in the open because it is this context in which this case was brought, that Galanis and Yamada stepped forward and said 'I did these things, and I want to pay for these things, but I don't want to spend the rest of my life in jail, I am 29 years old, I will make an agreement with you. I will tell you everything I know if you will reduce the amount of charges, potential charges, against me." R, 57-58*

Again, on direct examination, the Government elicited the statement from Yamada that "I agreed to tell the absolute truth. . . . I was going to start anew, and start a new life." R, 1577. In summation, the prosecuting attorney claimed that the cooperating witnesses has said "Enough, I want to tell the truth," and that in particular, Yamada "was honest" and his testimony bore "the hallmarks of credibility." R, 4015.

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* R refers to the trial transcript.

Although Yamada's testimony was pervaded by what Judge Mansfield termed "more than a trace of self-interest" 495 F.2d at 688, it was essential to the Government's case against petitioner. Petitioner's involvement in this "Byzantine" conspiracy was introduced through the testimony of Yamada, 495 F.2d at 686, and was based on an extraordinarily complicated series of meetings and conversations, the existence of which petitioner has steadfastly denied. The Government's own bill of particulars stated that petitioner was unaware of the heart of the conspiracy with which he was charged, and yet, despite the tenuousness of petitioner's connection with the "serpentine" course of the averred conspiracy, 495 F.2d at 688, the testimony most directly incriminating him in the "tangled web of falsity" was Yamada's. 495 F.2d at 687.

The affirmance of the Court of Appeals also rested upon the wholesale adoption of Yamada's version of events. For example, the Second Circuit's second footnote, 495 F.2d at 687, contains a categorical statement as to petitioner's motive for participating in the scheme. However, this interpretation of petitioner's reasons for engaging in the transaction described rests solely upon the word of Yamada; no other witness attributed evil motives to him in connection with the act which was essential to the Government's establishing the element of wilfulness on petitioner's part. In fact, that testimony was totally inconsistent with the Government's bill of particulars which stipulated that petitioner had received no unlawful compensation. Thus, it is abundantly clear that the jury's verdict as well as the affirmance by the Second Circuit was due to a conscious decision to accept the testimony of Yamada rather than the explanation offered by petitioner.

Almost immediately subsequent to the conclusion of the trial and during the pendency of the original appeal, a

series of events transpired which shattered the reliability of the Yamada testimony. As previously noted, Yamada had entered into a plea bargaining arrangement whereby, in exchange for his testimony against petitioner and others, he would be permitted to plead guilty to a lesser number of crimes and his cooperation disclosed to the sentencing judge. Yamada appeared before Judge Cooper for this purpose within two weeks of the termination of petitioner's trial. Stating that Yamada, unlike other defendants who had previously come before him, was unredeemed by proof of valuable community or charitable work, Judge Cooper sentenced him to a two-year term of imprisonment.

Thereafter, within a short period of time, Yamada moved for a reduction of sentence on the grounds that he was thoroughly reformed and, in fact, currently engaged in valuable social activities, namely, the rehabilitation of drug addicts. As evidence of his new found altruism and conscience, five letters were submitted to the sentencing judge, from a doctor, social workers, an employer and an addict, all heartily endorsing Yamada's plea for leniency.

On January 31, 1974, Yamada was indicted (Index No. 74 Cr. 100) on five counts of attempting to defraud the United States in violation of 18 U.S.C. §§ 1341 and 2; on five counts of conspiracy to defraud the United States in violation of 18 U.S.C. §§ 1341 and 2; and on five counts of false writing in violation of 18 U.S.C. §§ 1001 and 2. The Government in the indictment stated that the letters which Yamada had submitted to Judge Cooper in support of his plea for leniency were all "false, forged and fictitious." The entire, intricate scheme which Yamada had attempted to perpetrate in the Court was simply a tissue of lies and deceits. He had never engaged in any drug rehabilitation work whatsoever, and he was either unknown to the individuals whose letters of commendation on his behalf he

forged or else such persons were invented out of thin air and their letters fantasized by the author. It was later learned that Yamada had suborned several of his employees into transcribing his letters into their own handwriting so as to enhance the letters' authenticity.

On April 15, 1974, Yamada pleaded guilty to six (6) of the sixteen (16) counts in the indictment, and appearing before Judge Lasker for sentencing on this latest offense "explained his conduct" as follows:

> "Prior to my incarceration my feelings about going to prison were no different than I suppose the standard version that one gets about prison from various periodicals, movies, or what-have-you and I was scared, I was irrational of every conceivable fear concerning prison. . . ."

Of all the statements made by Yamada, the above recitation of "irrational . . . fear" is the only one which can be taken at face value because it is the only factor which remains constant throughout Yamada's twisting and turning. From his indictment through to his re-sentencing by Judge Lasker, Yamada was possessed by the single, overmastering desire to escape prison; and this drive led him to tailor his testimony so as to appear most useful to a successful prosecution of the petitioner.

By the Government's own admission, Yamada's subsequent fraud "substantially vitiated" his usefulness as a witness, and their sentencing memorandum to Judge Lasker, set forth in the appendix herein, states:

> "We stress at the outset that, upon this sentence, Yamada is entitled to no consideration whatsoever for any *previous* or future cooperation with the Government." (emphasis added.) (App. 19a)

This statement alone under this Court's holding in *Mesarosh* v. *United States*, 352 U.S. 1 (1956), more fully discussed *infra*, would be sufficient to require that petitioner herein be accorded a new trial. However, it is submitted that Yamada's fraudulent letter scheme goes further than destroying his general reliability as a Government witness, but also impeaches the factual substance and particulars of his testimony as well. This conclusion follows for the foregoing reasons.

First, the Government's sentencing memorandum firmly establishes Yamada's predisposition to seize upon suggestions made to him by Government officials, and from that starting point, to fabricate facts and events which would serve to substantiate them. This disturbing tendency is underscored by the Government's statement that Yamada concocted his fraudulent letter scheme at his first sentencing when Judge Cooper contracted his situation with that of another defendant who had received leniency due to his involvement in social work. The extent of Yamada's neurotic suggestibility is indicated by the fact that his forged correspondence attempted to parrot the very language of the prosecutor at his original sentencing. Thus, the Government's memorandum notes:

> "The letters betray a deliberate effort to fabricate information which Yamada knew would commend themselves to Judge Cooper's attention. The first letter, for example purportedly written by the physician-director of the clinic, states, 'I find it inconceivable that a man who had devoted a tremendous amount of time over the past two years to interview our patients and help secure employment for many should be sentenced for violations which were committed before entering a new field of business and social outlook.' Such language appears almost as a direct response to

> an observation of the prosecutor at the time of sentence: '. . . having recently reread your Honor's opinion in the Benjamin Haggett motion for reduction of sentence I know that your Honor is of the very strong opinion that it is as much the conduct of the defendant after the crimes have been committed as it is his conduct before which must be taken into account by a sentencing judge' ". (App. 15a-16a)

Yamada was thus conditioned to seize upon random, extemporaneous remarks made by Government officials and parlay them into complex schemes favorable to himself. The trait manifested itself in Yamada's letter scheme; it surfaced even more dramatically in his testimony at petitioner's trial, which was preceded by numerous meetings with the S.E.C. staff and U.S. Attorney's office at which his elaborate falsehoods first germinated, and under the prosecution's promptings, flourished into the same kind of refined and intricate fantasy as his fraudulent letter scheme.

A second connection between his letter scheme and his testimony at petitioner's trial consists of Yamada's demonstrated predilection for drawing innocent individuals into his own web of criminal activities. As set forth by the Government in its memorandum, Yamada did not hesitate to suborn his own secretary, his chauffeur and his chauffeur's wife into forging the letters, nod did he feel any reservations about unjustly maligning a physician and a probation officer in the fictitious correspondence. (See App. 17a, 23a)

A further bridge between Yamada's testimony at petitioner's trial and his subsequent perjury is the haste with which he proceeded from the former to the latter. The Government has maintained that it was only after his

original sentencing that Yamada reverted to his sinful ways. Such a position is untenable in light of the Government's own admission that Yamada broke his plea bargaining arrangement "almost as soon as it was made." (App. 20a) In light of the speed and wholesale manner in which the pact was violated, it cannot be realistically contended that Yamada was the victim of a "Jekyll and Hyde" syndrome whereby he was truthful or untruthful as the situation demanded. On the contrary, his perjury existed from his indictment to his resentencing, because, as the Government states, he

> ". . . fully expected to manipulate the court, just as he had previously manipulated the victims of his financial frauds . . . [and Yamada] has demonstrated a cynical disregard for the administration of justice and an attitude that this Court is as vulnerable to deception as any victim of a securities fraud." (App. 24a)

Finally, the bearing of Yamada's fraudulent letter scheme upon his testimony at trial is seen in their striking psychological similarity. Both are characterized by an ability to construct intricate and detailed relationships; both instances display a brilliance at manufacturing events and sophisticated transactions. The resemblance is so uncanny that the very substance and particulars of Yamada's testimony at trial must be cast into grave doubt.

In sum, it violates the dictates of common sense to hold that the "tangled web of falsity" which Yamada wove at petitioner's trial is any more credible than the whole tissue of lies relating to his "drug rehabilitation work." Rather, the brazenness of Yamada' deception and the extent of his deceit reveal a continuing pattern of conduct which requires that a new trial be granted petitioner.

On the basis of the above facts, petitioner made a motion for a new trial pursuant to Rule 33 of the Federal Rules of Criminal Procedure before the trial judge. The motion was denied. On appeal, the District Court's denial was affirmed in a written opinion, not yet officially reported, a copy of which is reprinted in the appendix.

Reasons for Granting the Writ

1. In failing to apply this Court's holding in *Mesarosh* v. *United States* to a situation where it is fully applicable, the Second Circuit called into question the continuing validity of that case, and has created a conflict between itself and the Ninth Circuit which requires review by this Court.

The immediate controversy is governed by *Mesarosh* v. *United States*, 352 U.S. 1 (1956), and in view of the principles set forth in that case, it must be concluded that the lower courts erred in not granting petitioner a new trial.

In *Mesarosh*, petitioners were convicted of conspiracy to violate the Smith Act, largely upon the testimony of seven Government witnesses, including an undercover agent who specialized in anti-communist affairs named Joseph D. Mazzei. Subsequent to Mazzei's appearance at petitioners' trial, he was called as a Government witness in a series of other, unrelated prosecutions of alleged subversives. As these proceedings progressed, Mazzei's testimony became increasingly bizarre and farfetched. For example, in one case he stated that a communist executioner had been dispatched to liquidate Senator Joseph R. McCarthy; in another, Mazzei asserted that the FBI had coerced him into falsely pleading guilty to charges of "adultery and bastardy" in a Pennsylvania State Court.

As his testimony grew more and more preposterous, the Government became concerned about the possibility that

Mazzei's later statements might cast doubt over the credibility of his testimony at past trials, including Mesarosh's. Therefore, approximately four years after Mesarosh's conviction, and while the *Mesarosh* case was on appeal to the Supreme Court, the Solicitor General filed motion papers with this Court in which he stated that although several of Mazzei's recent statements were either known or believed by the Department of Justice to be false, he asserted that Mazzei's testimony at petitioners' trial "was entirely truthful and credible." Conceding that a genuine issue with regard to veracity of Mazzei's testimony against Mesarosh might exist, however, the Solicitor General suggested that the question be resolved pursuant to a hearing before the district court judge.

While lauding the Government's commendable candor, this Court* held that a new trial was the only correct remedy:

> "The dignity of the United States Government will not permit the conviction of any person on tainted testimony. This conviction is tainted, and there can be no other just result than to accord petitioners a new trial.
>
> "The district judge is not the proper agency to determine that there was sufficient evidence at the trial, other than that given by Mazzei, to sustain a conviction of any of the petitioners. Only the jury can determine what it would do on a different body of evidence. . . ." 352 U.S. at 9, 12.

Chief Justice Warren went on to conclude:

> "Mazzei, by his testimony, has poisoned the water in this reservoir, and the reservoir cannot be cleansed

* Five justices were for a new trial while three justices believed that there should be a remand for an evidentiary hearing on the issue of Mazzei's credibility.

> without first draining it of all impurity. This is a federal criminal case, and this Court has supervisory jurisdiction over the proceedings of the federal courts. If it has any duty to perform in this regard, it is to see that the waters of justice are not polluted. Pollution having taken place here, the condition should be remedied at the earliest opportunity. . . .
>
> "The government of a strong and free nation does not need convictions based upon such testimony. It cannot afford to abide with them. The interests of justice call for a reversal of the judgments below with direction to grant the petitioners a new trial." 352 U.S. at 14.

The facts of the instant case are, if anything, even more compelling than those in *Mesarosh*. Here, Yamada's fraud, motivated as was his cooperation with the U. S. Attorney by a desperate desire for leniency, grew out of the same operative set of circumstances as his testimony at petitioner's trial. Mazzei's alleged untruths, on the other hand, were all uttered in wholly unrelated matters, and for reasons which the Solicitor General could not establish, except to speculate that his behavior resulted from "a psychiatric condition." Mazzei was one of seven witnesses against Mesarosh, and his subsequent, credibility-shattering statements were uttered years after the Mesarosh trial; in the immediate case, however, Yamada was one of two essential witnesses against petitioner, and his perjury was committed within weeks of his testimony at trial.

Furthermore, in *Mesarosh*, Mazzei's credibility only came into question by way of a letter from the Solicitor General conceding that a reasonable man might believe that a genuine issue existed as to the truthfulness of the witness's past testimony. The Solicitor General steadfastly main-

tained, however, that Mazzei's statements in the Mesarosh proceeding were accurate. The case at hand involves a far graver confession of error on the part of the Government: here the prosecution has *indicted, convicted* and *sentenced* its main witness for numerous subsequent perjuries which have been established beyond the peradventure of a doubt.

It would therefore seem that petitioner is entitled to a new trial, under the *Mesarosh* holding, but such has not been the case. The District Court in denying petitioner's motion for a new trial rested its decision on the belief that the newly discovered evidence was merely "cumulative on impeaching his credibility," (App. 9a) and consequently, not a sufficient basis for the granting of a new trial. In attempting to distinguish *Mesarosh,* the trial judge cited the portion of the opinion which reads:

> "Such an allegation by the defense ordinarily will not support a motion for a new trial, because new evidence which is 'merely cumulative or impeaching' is not, according to the often repeated statement of the Courts, an adequate basis for the grant of a new trial." 353 U.S. at 9.

The District Court was in error on both grounds. As to the first, the connective tissue between Yamada's letter scheme and his testimony at trial is fully set forth in the statement of facts *supra.* Despite this wealth of evidence relating to the witness's perjury committed subsequent to his testimony at petitioner's trial, the trial judge was simply unwilling to acknowledge that what was brought to his attention was not simply an additional series of falsehoods occurring *prior* to Yamada's "cooperation" with the Government, as in the usual case, but rather proof that Yamada's deceit permeated his entire involvement with the proceedings from start to finish.

Moreover, the decision is lamentably facile in its attempt to distinguish *Mesarosh*. It should be noted that *Mesarosh* does not require the Government witness to commit subsequent acts which call into question his factual testimony at previous trials; all that is necessary is that he commit acts which cause the Government to take steps against him which cast doubt upon his general credibility as a witness at petitioner's trial. Failing to confront the issue, the trial court notes that a *Mesarosh* situation has not arisen because it is the *defense,* rather that the Government, which has brought the new evidence to the Court's attention, and thus, the case is an "ordinary" one not worthy of special consideration.

That position is untenable. *United States* v. *Chisum,* 436 F.2d 645 (9th Cir. 1971), makes into law what is evident to common sense: that is, for purposes of a motion for a new trial based on *Mesarosh,* a *criminal indictment* will be considered equivalent to the Solicitor General's admitted doubts about the reliability of a Government witness.

In *Chisum,* defendant was convicted of various narcotics offenses, principally upon the testimony of one Saiz, a Government informer. Two years later, Chisum filed a motion to vacate the judgment and grant him a new trial in support of which he presented the court with a copy of a multicount indictment, which had recently been brought against Saiz. The Court on its own initiative ascertained that Saiz had pleaded guilty to a single count, that of giving false testimony at a trial unrelated to Chisum's, and was subsequently sentenced to a year's imprisonment. This newly discovered evidence had no bearing on factual issue in Chisum's trial, except insofar as it indicated that the Government agents who were responsible for Chisum's conviction had an apparent tendency towards perjury and suborning witnesses, and that they had likely indulged

those tendencies during a trial contemporaneous with the dates on which Chisum was alleged to have committed the crimes for which he was later convicted.

The Court, citing extensively from *Mesarosh*, reversed the District Court's denial of defendant's motion for a new trial, stating:

> "This case differs from *Mesarosh* in one respect. There, as the Chief Justice emphasized, it was the government which brought Mazzei's perjury to the Court's attention. In our case, it is the defendant who has done so. But what is before us is not the usual case in which a defendant asserts that a witness has perjured himself. Here, it is the government itself that brought the charge against Saiz and Downing. . . .
>
> "We hold that Chisum's conviction is as much tainted as was the conviction in *Mesarosh*." 436 F.2d at 649.

It therefore appears that the District Court's attempt to distinguish *Mesarosh* is erroneous, or else, so at odds with the reasoning of the Ninth Circuit as to warrant review by this Court.

In affirming the District Court's denial of the motion for a new trial, the Second Circuit analyzed that issue simply as an ordinary Rule 33 motion. It stated that it felt obliged to follow the determination of the trial judge that the "newly discovered evidence" was "cumulative on the issue of credibility," and that the lower court had not abused its discretion in so finding. Realizing that that determination might not dispose of the appeal because *Mesarosh* considerations were present, the Second Circuit stated:

> "*Mesarosh* v. *United States*, 352 U.S. 1 (1956), gives no support to the contentions of appellants here. It

did not involve a defense motion for a new trial but rather a *sui generis* exercise by the Supreme Court of its supervisory jurisdiction at the instance of representation submitted by the Solicitor General." (App. 5a)

To the extent that the Second Circuit is attempting to distinguish *Mesarosh* on the grounds that there, it was the Government which instigated the motion, the Court's decision runs afoul of *Chisum, supra.* If the Second Circuit is pleading that it lacks the "supervisory jurisdiction" to apply the *Mesarosh* principles, it is likewise incorrect, since it is obvious that the circuit courts of appeal possess such discretionary powers over the administration of justice in the district courts. See *Chisum* v. *United States, supra; United States* v. *Basurto,* 497 F.2d 781 (9th Cir. 1974); *Bursey* v. *United States,* 466 F.2d 1059 (9th Cir. 1972); *United States* v. *Poole,* 379 F.2d 645 (7th Cir, 1967). Thus, although the opinion of the Second Circuit was unanimous, it was couched in language which invites review by this Court.

It is submitted that the Second Circuit's resistance to *Mesarosh* stems from a fear that to give its rationale full vent would result in the further burdening of an already overburdened district court calendar. However, whether solicitude for the voluminous case load of the Southern District of New York is sufficient grounds for abandoning the *Mesarosh* principles is a decision which only this Court, not the lower courts, can make. If, upon inquiry, the Court feels that *Mesarosh* is an historical curiosity or a procedural luxury which our system of justice can longer afford, it should so state, and explicitly overrule the decision. If it is to have continued vitality, however, this Court must direct the lower federal tribunals to apply its full force where, as here, the occasion demands it.

In making the determination, this Court should be aware that contrary to the fears expressed by the Second Circuit, *Mesarosh* is a narrow decision; it comes into play only when a major Government witness commits subsequent crimes which cut directly to the heart of his credibility at a defendant's trial. Thus, the witness' subsequent violent crimes or demonstrated instances of moral turpitude which do not affect the veracity of his testimony are not sufficient to invoke *Mesarosh.*

Indeed, statistics indicate the remoteness of the possibility of the recurrence of *Mesarosh*—activating fact patterns. In the eighteen years elapsed since the Supreme Court announced the decision, less than ten reported federal cases have cited *Mesarosh* as providing grounds for a new trial. And of those cases, in only one, *Chisum* v. *United States,* has the Court granted the motion for a new trial.* Contrary to the statement by the Second Circuit that petitioner "would have us develop some new law because of what they call the special circumstances of this case," petitioner seeks nothing more than this Court's affirmation of the continuing validity of *Mesarosh.*

Thus, a review of *Mesarosh* would provide this Court with an opportunity to (1) clarify the relationship between that case and traditional motions for new trials pursuant to Rule 33 of the Federal Rules of Criminal Procedure, (2) define the scope of appellate review in applying *Mesarosh* to appropriate situations, and (3) most importantly, to reconsider the principles set forth in that case in light of realities of contemporary criminal practice, and to thus determine if *Mesarosh* should be considered as anything more than a dead letter.

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* See also *United States* v. *Gordon,* 246 F. Supp. 522 (D.D.C. 1965), *aff'd,* 383 F.2d 936 (D.C. Cir. 1967), where defendant was awarded a new trial on traditional Rule 33 grounds although the circumstances of that case are analogous to the immediate one and seemingly involve *Mesarosh* considerations.

2. The decision of the Second Circuit misstates the relevant standard for the granting of a new trial under Rule 33.

In cases involving the possibility of perjury at trial by a key government witness, the relevant Rule 33 standard for determining the materiality of such newly discovered evidence is whether it *"might"* result in a different verdict in the event of a retrial. *United States* v. *Miller,* 411 F.2d 825, 830 (2d Cir. 1969); *United States* v. *Hiss,* 107 F. Supp. 128 (S.D.N.Y. 1952), *aff'd* 201 F.2d 372 (2d Cir. 1053), *cert. den.* 345 U.S. 942 (1953); *Larrison* v. *United States,* 24 F.2d 82 (7th Cir. 1928). See also *United States* v. *Johnson,* 327 U.S. 106, 111 n. 5 (1946). The Second Circuit invoked a far harsher standard, and thus ignored its own decisions regarding the requirements for the grant of a new trial under Rule 33.

The Second Circuit agreed with the trial judge's finding that there was

> ". . . no probability that on a new trial with the benefit of the evidence concerning the fraudulent letters a new jury would reach a different conclusion. . . ."

The Second Circuit further stated:

> "We are not persuaded that a new jury would decide the case differently if it knew that Yamada's claim at the first trial that he had reformed and turned over a new leaf was false."

The Second Circuit thus relied on a test which is tantamount to saying that a court must be *certain* that a jury would reach a different result. As cited above, the correct standard is whether that jury *might* reach a different verdict.

CONCLUSION

For all of the above reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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